

**COALITION FOR CORPORATE CERTAINTY**

comprising

**AUSTRALIAN INSTITUTE OF COMPANY DIRECTORS  
BUSINESS COUNCIL OF AUSTRALIA  
INSTITUTE OF CHARTERED ACCOUNTANTS IN AUSTRALIA  
INVESTMENT & FINANCIAL SERVICES ASSOCIATION  
LAW COUNCIL OF AUSTRALIA  
SECURITIES INSTITUTE OF AUSTRALIA**

**JOINT SUBMISSION**

TO THE

**PARLIAMENTARY JOINT STATUTORY COMMITTEE  
ON CORPORATIONS AND SECURITIES**

ON THE

**INQUIRY INTO THE PROVISIONS OF (A) THE *CORPORATIONS (COMMONWEALTH POWERS) ACT 2001* (NSW); AND (B) THE CORPORATIONS BILL 2001 AND THE AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION BILL 2001.**

The Coalition for Corporate Certainty welcomes the opportunity to provide comment on the provisions of the *Corporations (Commonwealth Powers) Act 2001* (NSW), the Corporations Bill 2001 and the Australian Securities and Investments Commission Bill 2001.

**ABOUT THE COALITION**

The Coalition for Corporate Certainty comprises the Australian Institute of Company Directors, the Business Council of Australia, the Institute of Chartered Accountants in Australia, the Investment & Financial Services Association, the Law Council of Australia and the Securities Institute of Australia. This coalition of business, financial and legal organisations was established as a matter of urgency because of a recognition by these bodies that it was vital for all the Australian governments to take immediate action to address the uncertainty and confusion which surrounded the status of Australia's Corporations Law following recent decisions of the High Court, culminating in the decision in *The Queen v Hughes*.

## **SUPPORT FOR REFERRAL**

The Coalition is strongly of the view that the referral of powers as currently proposed is the most appropriate means of quickly resolving the confusion and uncertainty surrounding corporate regulation and preserving the asset to Australia which the national scheme of corporate regulation represents. We believe that the legislation, supported by a revised Corporations Agreement between governments, provides a sensible outcome that balances State concerns over the use of the referred power with certainty and consistency in corporate regulation across Australia. The Coalition believes that the legislation that is now being considered by the Committee is constitutionally sound, and the best course currently available to withstand inevitable legal challenges. We urge the Committee to support the legislation.

Once the referral legislation is in place, and stability has returned to the corporate law area, it may be appropriate for a more permanent and neater solution, legally and constitutionally, to be examined and possibly implemented.

The Coalition has supported publicly the commitment of the Federal, State and Territory governments to resolve this uncertainty through the referral of relevant State powers to the Commonwealth. The Coalition has also supported the agreement between the Prime Minister and the Premiers of New South Wales and Victoria on the final terms of that referral and commends the NSW Parliament for giving effect to that referral through the *Corporations (Commonwealth Powers) Act 2001* (NSW).

## **CURRENT UNCERTAINTIES**

Since 1991, Australia has had an efficient and effective scheme for national corporate regulation which has supported business activity and employment in Australia by facilitating growth of Australia's capital markets and establishing Australia as an attractive base for doing business internationally, particularly in the financial services sector.

Recent decisions of the High Court, culminating in the decision in *The Queen v Hughes*, have resulted in considerable uncertainty and confusion around the status of Australia's national corporations law regime. In addition, as a result of the relevant decisions, it has not been possible for the Federal Court of Australia, which had built up a considerable body of expertise in dealing with the interpretation of the Corporations Law, to consider such questions. This has proved to be damaging both to the efficient administration of justice generally and to the wishes of the business, financial and legal communities.

As a result of these difficulties, business, financial and legal groups have expressed concern that unless Federal and State governments act quickly to resolve this uncertainty it will compromise Australian business activity and irretrievably damage Australia's international reputation.

The High Court decisions cast doubt on quite fundamental areas of business law such as the operation or formation of companies and enforcement. For example, past actions of the Australian Securities & Investments Commission relating to company registrations and the granting of exemptions or modifications could be declared invalid, so that Australian companies face considerable risk and potential expense. It is also inevitable that some individuals will seek to take improper advantage of the ongoing confusion and the Director of Public Prosecutions will necessarily be cautious about commencing prosecutions where laws have dubious constitutional validity.

This arguably has led, and will continue to lead, to a lack of confidence in Australia's corporate law both domestically and internationally, making it difficult for Australian companies to raise capital through equity issues or loans.

This is not a merely theoretical danger for Australian business and investment because legal and financial advisers are required to point out these risks in prospectuses and opinions that support equity

raising or loan transactions, and they are doing it now. For example, the recent public offer document for one major Australian entity (Alintagas) was qualified because of the ongoing uncertainty.

It is of particular concern that this is also happening at an international level. We are aware of a significant international transaction where European parties, including their English and American lawyers, were cautioned about the possible impact of the recent High Court decisions on the legal status of a significant Australian listed entity involved in the transaction. This qualification caused considerable surprise, because unqualified opinions about legal status of entities and availability of insolvency administration are regarded as routine when dealing with companies incorporated in “first world” economies. This has serious implications for Australia’s standing as an investment destination and detracts from Australia’s standing as a regional centre for financial markets and products. Once knowledge of this uncertainty becomes more widespread internationally, the damage to Australia’s reputation as a “safe” place to do business will be very difficult to repair.

### **RESIDUAL STATE CONCERNS**

The Coalition is aware of the concerns that have been expressed by the representatives of some States that there is potential for the Commonwealth to misuse the referred powers, for example, for the purposes of regulating industrial relations or the environment. These matters have been the subject of intense negotiation between the Federal and State governments in particular. The Coalition has also met with a number of State Attorneys-General to discuss their concerns in this area.

It is the view of the Coalition that the current proposal to address these concerns through the Corporations Agreement is the most appropriate course of action. The Coalition has examined proposals for including exclusionary provisions within the referral legislation and has discussed these provisions with their proponents. We remain of the view, however, that such exclusionary provisions raise too many legal uncertainties. For this reason, the Coalition strongly supports these matters being addressed in the Corporations Agreement rather than in the legislation.

### **TIMING**

The Coalition recognises the complexities and difficulties associated with this matter and does not underestimate the significance of these issues for the Federal, State and Territory governments. The Coalition is concerned, however, that considerable time has elapsed since the uncertainties surrounding corporate regulation became apparent.

The Coalition recognises Parliament’s right to examine fully legislative proposals before it, and to make amendments that it considers appropriate. We urge, however, that the Committee has regard to the lengthy negotiation process that has already been undertaken by Federal, State and Territory governments. The Coalition also asks that the Committee takes into account that any changes to the referral legislation currently before the Parliament will have to be enacted by both houses of the NSW Parliament and each of the other relevant parliaments into which the legislation has been introduced. This would significantly delay completion of the referral process.

### **CONCLUSION**

The Bills currently before the Federal Parliament are the culmination of a long process of negotiation between the Federal, State and Territory governments. They have the support of the majority of governments and all governments recognise the urgency attached to achieving a workable solution to the uncertainty about the validity of the corporate law regime in Australia. The Bills also have the full support of the business, financial and legal groups represented by this submission.

The proposed legislation, coupled with the agreed revisions to the Corporations Agreement, provides a sensible and constitutionally appropriate outcome that balances State concerns over the use of the referred power with certainty and consistency in corporate regulation across Australia. The Coalition

therefore supports the earliest passage of the Bills and would hope to see the new regime in place on 1 July 2001.

The Coalition would be pleased to discuss further any of the matters covered in this submission. Our contact officers for this matter are Steven Münchenberg, Assistant Director, Business Council of Australia (03 9610 4222 or [steven.munchenberg@bca.com.au](mailto:steven.munchenberg@bca.com.au)) and Kathleen Farrell, Chairman of the Corporation Law Committee of the Law Council of Australia (02) 9225 5305 or [kathleen\\_farrell@freehills.com.au](mailto:kathleen_farrell@freehills.com.au)

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